

**STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
45 Fremont Street
San Francisco, California 94105**

**NOTICE OF PROPOSED EMERGENCY ACTION
PURSUANT TO INSURANCE CODE SECTION 12921.7 AND
GOVERNMENT CODE SECTION 11346.1**

DATE: December 15, 2008

REGULATION FILE: ER-2008-00003

**FORM OF APPLICATION FOR TITLE MARKETING REPRESENTATIVE
CERTIFICATE OF REGISTRATION**

**OPPORTUNITY FOR INTERESTED PARTIES TO SUBMIT COMMENTS TO THE
OFFICE OF ADMINISTRATIVE LAW**

Paragraph (a)(2) of Government Code section 11346.1 requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

EXPRESS FINDING OF EMERGENCY

AUTHORITY AND REFERENCE

The proposed regulations will implement, interpret and make specific the provisions of Insurance Code sections 12404, 12418, 12418.1, 12418.2, 12418.3, and 12418.4 (Stats. 2008, ch. 280, §§ 1-2 (SB 133)). Insurance Code sections 12404, 12418, 12418.1, 12418.2, 12418.3, and 12418.4 provide authority for this rulemaking, as do the following decisions of the California Supreme Court: *CalFarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805 (1989), and *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216 (1994).

**INFORMATIVE DIGEST; DESCRIPTION OF THE PROBLEM AND THE NECESSITY FOR
THE REGULATION**

Summary of Existing Law

Signed into law on September 25, 2008, SB 133 (Aanestad) provides that “[n]o person shall be employed as a title marketing representative in this state unless the person holds a valid ‘certificate of registration’ as a title marketing representative issued by the commissioner” Ins. Code § 12418, subd. (a). The legislation defines the term “title marketing representative” as “a natural person employed by a title insurer, underwritten title company, or controlled escrow

company whose primary duty is to market, offer, solicit, negotiate, or sell title insurance.” Ins. Code § 12418, subd. (b). In order to receive a title marketing representative certificate of registration, applicants must apply using “a form prescribed by the [Insurance] [C]ommissioner.” Ins. Code § 12418.1, subd. (a). Further, the form of application “shall prescribe the disclosure of information that will aid the commissioner in determining whether the prerequisites for the certificate have been met.” Id. The legislation becomes effective on January 1, 2009.

The legislation specifies that if an “application is found to be defective or incomplete,” the Department shall so notify the applicant, giving him or her fifteen days from the receipt of the Department’s notice in which to complete, or remedy the defect in, the application. Ins. Code § 12418.1, subd. (d). Provisional authority to operate as a title marketing representative is conferred upon applicants “submitting an application filed with the department,” until such time as the application is approved or denied. Ins. Code § 12418.1, subd. (e). “An applicant with a pending application,” the statute proceeds, “shall be deemed to be operating on a provisional basis.” Id.

The legislation further specifies that applicants are to pay an application fee to be determined by the Department, not to exceed \$200. Ins. Code § 12418.1, subd. (c). Each application must include a statement, signed by an officer of the company by whom the applicant is or will be employed, certifying that the applicant will be provided certain training. Ins. Code § 12418.1, para. (b)(2). The employer is required to notify the Department if the title marketing representative’s employment is terminated and, should the title marketing representative become employed by another title company, the new title company is required to notify the Department of that fact. Ins. Code § 12418.1, subd. (f).

The statute specifies that certain existing Insurance Code sections that apply generally to the licensing of insurance producers also apply “to all applicants or holders of a certificate of registration.” Ins. Code § 12418.4, subd. (a). Specifically enumerated among these applicable code sections, Insurance Code section 1669, for instance, provides for denial of an application, without the necessity of a hearing, to applicants having committed felonies or certain misdemeanors, to applicants who have had a professional, occupational or vocational license denied for cause, and to applicants who have had such a license revoked within five years of the date of the filing of the application in question. Another of the enumerated existing code sections provides more subjective grounds for denial of an application: “The applicant is not of good business reputation,” for example, or “[t]he applicant is lacking in integrity.” Ins. Code § 1668, subds. (d) and (e).

Title 18, United States Code, section 1033 provides that it is a criminal offense for an individual who has been convicted of a felony involving dishonesty or breach of trust, or any violation of 18 U.S.C. § 1033, to willfully engage or participate in the business of insurance unless that person has first obtained the written consent of the appropriate regulatory official. Further, it is a criminal offense for any person to willfully employ, or willfully permit, such “prohibited persons” to participate in the business of insurance without the required written consent. 18 U.S.C. § 1033. Title insurance is the business of insurance for this purpose.

Policy Statement Overview

The purpose of the proposed regulations is to implement SB 133. The problem the regulations are intended to address is that applications must by law be submitted to the Department, but there is currently little or no guidance available as to the content of these applications or the method whereby they will be submitted. Specifically, the commissioner is required to prescribe the form of the application for the title marketing representative certificate of registration and to specify the information applicants will be required to provide that will aid the Commissioner in determining whether to issue or deny the certificate.

As a practical matter, the regulations must, at the very least, provide a means of determining whether or not an application is complete and has been filed with the Department. The Department seeks to set out in the proposed regulations an application process that is efficient, that is fair to applicants and that, above all, protects the interests of consumers.

Effect of Proposed Action

To apply for the title marketing representative certificate, all applicants will be required to fill out an online form and provide fingerprint impressions. The online portion of the application will require the applicant to provide identification information necessary for purposes of ensuring that the applicant is who he or she claims to be. The online application will require citizenship information and work history for the preceding five years. The online application will also require the applicant to provide answers to certain background questions. Applicants whose answers to the background questions indicate that grounds for denial of the application (e.g., a criminal record) may be present must, in order to complete the application, submit to the Department a written statement detailing the circumstances of the potentially problematic personal history in question and submit documentation of the relevant proceedings (e.g., charging documents and court documents.)

All applicants who complete the online application will be deemed to have completed the application for the certificate, to have filed the application for the certificate and to have an application pending with the Department. Accordingly the applicant will be permitted to operate as a title marketing representative on a provisional basis, as specified in statute. However, in the event the Department sends an applicant a notification that his or her application is incomplete or deficient, the applicant must respond within fifteen days of receiving the notification, or his or her application will at that time be deemed to be incomplete, not filed and not pending with the Department. Consequently the applicant's provisional authority to operate as a title marketing representative will be suspended.

The Department may require that certain information and documents, all as identified in the regulations, be submitted in the applicant's response to the Department's notification of incompleteness or deficiency in order for the applicant to avoid having his or her provisional authority suspended. For example, the Department may require certain evidence, specified in the regulations, that the applicant has had his or her fingerprint impressions made using the procedure set out in the regulations. This, and any other information identified in the Department's notification as being necessary in order to complete or perfect the application

must, according to Insurance Code section 121418.1, be sent to the Department within fifteen days of the receipt by the applicant of the notification. However, it may sometimes be impossible for applicants who are required to submit court documents, for example, to obtain the documents in time to provide them to the Department within fifteen days of receiving the Department's notification. For this reason, the regulations specify that applicants who are required to submit such documentation but who do not yet possess the required documents must make copies of the letters they send to the court, for instance, in an effort to obtain the documents. Applicants may then submit the copies of this correspondence to the Department within the statutory timeframe and, by doing so, maintain their provisional authority intact. The regulations provide that the Department cannot suspend an applicant's provisional authority unless the notification of deficiency has been sent within thirty days after the applicant completes the online application.

The regulations specify that provisional authority to operate as a title marketing representative shall not be granted to an applicant who previously has had his or her provisional authority suspended two or more times, or to an applicant who has previously had an application denied. These applicants will be required to wait until the certificate is actually issued before being permitted to operate as a title marketing representative.

Employers of title marketing representatives will be required to make the statutorily mandated statement that training will be provided, and their statutorily mandated notifications of employment or termination of a title marketing representative, online using the Department's online business entity services. However, employers will also be required to maintain hardcopy of the statement that training will be provided, signed by an officer of the company, to satisfy the pertinent provision of statute.

Comparable Federal Law

There is no existing federal statute or regulation that is comparable to the proposed regulations.

MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The proposed regulations do not impose any mandate on local agencies or school districts. There are no costs to local agencies or school districts for which Part 7 (commencing with Section 17500) of Division 4 of the Government Code would require reimbursement.

COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES OR SCHOOL DISTRICTS OR IN FEDERAL FUNDING

The Commissioner has determined that the proposed regulations will result in no cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code, no other nondiscretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State.

The Department of Insurance will incur additional costs in the processing of applications for the title marketing representative certificate of registration. However, most if not all of the costs

incurred by the Department are expected to be offset by the \$200 application fee specified in the regulations. Assuming there are 1,500 applicants for the certificate, the Department would collect \$300,000 in fiscal year 2008-2009. Though costs to the Department are expected to exceed total fees paid, it is not certain by what margin costs will exceed this revenue, nor can the Department accurately predict the number of applications that will need to be processed.

DESCRIPTION OF SPECIFIC FACTS DEMONSTRATING THE EXISTENCE OF AN EMERGENCY AND THE NEED FOR IMMEDIATE ACTION; DESCRIPTION OF THE JUSTIFICATION FOR ADOPTION OF THE REGULATION AS AN EMERGENCY REGULATION

The proposed regulations are necessary to effectuate the statute they are implementing: SB 133. The statute requires to the Department to prescribe the form of application by which applicants are to apply to receive the Title Marketing Representative Certificate of Registration. Without the proposed regulations, the Department would have no enforceable way of determining whether or not such applications were complete, or even submitted to the correct office within the Department. However, the statute must be implemented, in order to carry out the legislative intent that the problem of illegal rebates and inducements dispensed by title marketing representatives be addressed. Additionally, given the bill's requirement that title marketing representatives cannot after January 1, 2009 continue to operate as such unless they have a complete application filed and pending with the Department, further grave consequences would result if these applications could not be completed.

The Department finds that the proposed regulations are necessary to address an emergency. An emergency is "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." Gov. Code § 11342.545. Any disruption of the orderly working of the title insurance industry would result in serious harm to the public welfare, particularly during the current housing crisis. It is common knowledge that the nation and the State are in the midst of one of the severest economic downturns of the century. Any impairment of the availability of title insurance can only serve to worsen the ongoing economic meltdown, which itself is widely acknowledged to be driven by rapidly falling home prices. Should it become more difficult than at present to obtain title insurance, the purchase of a home will become an even less attractive investment than currently, and any number of potential home buyers will be discouraged from buying, which will in turn exacerbate the vicious cycle of plunging real estate values.

By the same token, artificially inflated prices for title insurance resulting from lack of competition in the title insurance market also tend to make buying a home less attractive than it would otherwise be, thereby contributing to the current harsh economic circumstances. The purpose of SB 133 is "to address the use of illegal rebates and inducements by persons marketing title insurance and related products from the real estate industry" (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 133 (2007-2008 Reg. Sess.) as amended August 8, 2008, p.7). Because most home buyers choose the title company recommended to them by their real estate agent or broker,

the provision of special perks by title marketing representatives to real estate agents and brokers, and the resulting referral of business by these real estate licensees to the title company represented by the title marketing representative, can limit competition in the marketplace and can result in consumers paying a higher price for a service than they might otherwise have obtained.... [T]he problem of illegal rebates by title marketing representatives has grown over the past several years.

(Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 133 (2007-2008 Reg. Sess.) as amended August 8, 2008, p.6) If SB 133 cannot be implemented, the purpose of the legislation will thus be thwarted, and artificially inflated title insurance premiums will continue to be a drag on home sales.

Title marketing representatives are defined in the statute as persons employed by a title insurer, underwritten title company, or controlled escrow company whose primary duty is to market, offer, solicit, negotiate, or sell title insurance. Yet the statute also provides that no one may be employed as a title marketing representative unless he or she holds the necessary certificate of registration. In other words, without the certificate no one may legally market, offer, solicit, negotiate, or sell title insurance, unless doing so is not that person's primary duty. Accordingly, if title marketing representatives cannot obtain the certificate of registration, the marketing, offering, negotiation and sales of title insurance will necessarily be impaired.

By its terms the statute requires title marketing representatives to apply for the certificate using the form prescribed by the Commissioner. However, if no form of application is prescribed by the Commissioner, applicants cannot apply for the certificate. If applicants could not apply, they could not be certificated and, as of January 1, 2009, no one would be legally able to market, offer, solicit, negotiate, or sell title insurance, unless doing so were not that person's primary duty. Since the proposed regulations are necessary in order to prescribe the form of application for the title marketing certificate, they are thus also necessary in order to avoid the disruption in the title insurance industry that would otherwise result if the certificates could not be issued, or even applied for.

In their present form the proposed regulations do nothing more than provide for the disclosure by applicants of information that is necessary for purposes of determining whether they meet existing legal requirements for certification. The regulations are clearly necessary in order to determine whether applications are complete and filed with the Department, which determination must be made if applicants are to qualify for the provisional authority set forth in the bill. Language that would be desirable in permanent regulations implementing the legislation (language specifying the procedure for renewal of the certificate, for instance) has been omitted from the proposed regulations in observance of the requirement of paragraph (b)(2) of Government Code section 11346.1 that emergency regulations address only the demonstrated emergency. The absence of a prescribed procedure by which title marketing representatives will apply for renewal of their certificates is not at this point a situation calling for immediate action to avoid serious harm to the public peace, health, safety, or general welfare; the absence of a prescribed form of application for obtaining the legally mandated certificates in the first place, on the other hand, clearly would constitute an emergency.

STUDIES AND REPORTS

The Department has relied upon no technical, theoretical, and empirical study, report, or similar document in connection with this action.